Supreme Court, U.S.
FILED
MAY 31 2001

No. 00-1560

IN THE

Supreme Court of the United States

JOSEPH GENTILE, *et ux.*, *et al.*,

Petitioners,

v.

THE QUAKER OATS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

MARTIN HARRIS
CONNELLY SHEEHAN MORAN
Attorneys for Respondent
150 South Wacker Drive
Suite 1600
Chicago, Illinois 60606
(312) 372-1969

167353

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Did two of the three petitioners, Gentile and Jeney, waive all issues raised in their Petition for Certiorari by settling their claims against Quaker?

2. Did the third petitioner, Coleman, waive all issues relating to his disparate impact claim, by failing to appeal a dispositive evidentiary ruling (which struck all of his statistical evidence from the record)?

3. When, as here, plaintiffs do not mention anything about a disparate impact claim in their pleadings, *and* fail to disclose their intent to pursue that theory during discovery, are they properly precluded from raising disparate impact claims, for the first time, during the summary judgment stage?

4. Is summary judgment proper when, as here, no evidence raises a genuine question about the veracity of the employer's nondiscriminatory explanation, *and* there is no probative evidence that age was the real reason for the decision to discharge these plaintiffs?

STATEMENT PURSUANT TO RULE 29.6

At present, Respondent, The Quaker Oats Company, has no parent corporation and no publicly held company owns 10% or more of its stock. However, Quaker has entered into a deal to be acquired by PepsiCo., Inc., in which case Pepsi would become Quaker's parent company. That deal is awaiting regulatory approval.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
I. Introduction: Summary of Reasons to Deny the Writ	1
II. Gentile and Jeney Waived All of Their Claims via a Settlement	4
III. Reasons to Deny the Writ — re: Disparate Impact claims	6
A. Background	6
B. Plaintiffs have Misdescribed the Ninth Circuit's Holding	7
C. A Predicate Issue: Disparate Impact Claims are Not Viable Under ADEA	8
D. Coleman Waived a Dispositive Evidentiary Issue	10
E. The Merits: a Disparate Impact Claim Must be Pled	11

Contents

Page

F. Plaintiffs Rely on an Inapplicable Rule of Civil Procedure 13

IV. Reasons To Deny the Writ — re: Disparate Treatment claims 14

A. General Standards for Summary Judgment: *Reeves* is Not Implicated .. 14

B. Plaintiffs have Misrepresented the Procedural History of These Cases ... 15

C. "Subjective" Criteria 17

1. Factual Background 17

2. Legal Analysis 17

D. The EEOC's "Reasonable Cause" Finding 20

1. Factual Background 20

2. Legal Analysis 22

E. Statistical Evidence 24

1. Factual Background 24

2. Legal Analysis 25

Conclusion 28

TABLE OF CITED AUTHORITIES

Page

Cases:

AFSCME v. County of Nassau, 96 F.3d 644 (2d Cir. 1996) 12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 15

Barnes v. Gencorp, 896 F.2d 1457 (6th Cir. 1990) .. 28

Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726 (9th Cir. 1984) 13

Chapman v. A.I. Transport, 229 F.3d 1012 (11th Cir. 2000) 19, 20

Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992) 22, 23

DiBiase v. Smithkline Beecham Corp., 48 F.3d 719 (3d Cir. 1995) 8

Doan v. Seagate Technology, 82 F.3d 974 (10th Cir. 1996) 18

EEOC v. Alioto Fish Co., 623 F.2d 86 (9th Cir. 1980) 23

EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994) 8

Cited Authorities

Page

EEOC v. Ins. Co. of North America, 49 F.3d 1418 (9th Cir. 1995) 23

Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996) 8, 9

Goldberg v. B. Green & Co., Inc., 836 F.2d 845 (4th Cir. 1988) 23

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 2, 8, 9

Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995) 18, 28

Johnson v. Mammoth Recreations, 975 F.2d 604 (9th Cir. 1992) 13, 14

Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304 (8th Cir. 1984) 23

Josey v. John R. Hollingsworth Corp., 996 F.2d 632 (3d Cir. 1993) 12

Kennedy v. Quaker, No. 97-CV-72094 (E.D. Mich. 1998) 21

Mangold v. Calif. Public Utilities Comm'n, 67 F.3d 1470 (9th Cir. 1995) 8

Cited Authorities

	Page
Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999)	8
Netterville v. Missouri, 800 F.2d 798 (8th Cir. 1986)	12
Nussell v. Quaker, No. 95-1257 (W.D. Mo. 1997)	21
Olitsky v. Spencer Gifts, Inc., 842 F.2d 123 (5th Cir. 1988)	23
Penk v. Oregon Bd. of Higher Educ., 816 F.2d 458 (9th Cir. 1987)	27
Raskin v. Wyatt Co., 125 F.3d 55 (2d Cir. 1997)	26
Rea v. Martin Marietta Corp., 29 F.3d 1450 (10th Cir. 1994)	26
Reeves v. Sanderson Plumbing, 530 U.S. 133 (2000)	3, 8, 14, 15
Risher v. Aldridge, 889 F.2d 592 (5th Cir. 1989)	18
Rose v. Wells Fargo & Co., 902 F.2d 1417 (9th Cir. 1990)	26
Rose v. Wells Fargo & Co., 902 F.2d 1417 (9th Cir. 1990)	9

Cited Authorities

Page

Sengupta v. Morrison-Knudson Co., 804 F.2d 1072 (9th Cir. 1986) 18

Sheehan v. Daily Racing Form, 104 F.3d 940 (7th Cir. 1997) 26

Smith v. Massachusetts Inst. of Tech., 877 F.2d 1106 (1st Cir. 1989) 23

Solterisch v. Quaker, No. 95-CV-72971 (E.D. Mich. 1996) 21

Walker v. Gates, 1990 WL 15101 (9th Cir. 1990) . 23

Watson v. Fort Worth Bank, 487 U.S. 977 (1988) . 18

Statutes:

29 U.S.C. § 623(f)(1) 9

42 U.S.C. § 2000e-2(k) 9

Rules:

Fed. R. Civ. P. 15(a) 13, 14

Fed. R. Civ. P. 16 13

Fed. R. Civ. P. 16(b) 7, 14

TABLE OF APPENDICES

Page

Appendix A — Waiver And Release Of Jerry Jeney Dated October 11, 1999 ..... 1a

Appendix B — Waiver And Release Of Joseph Gentile Dated October 11, 1999 ..... 10a

I. Introduction: Summary of Reasons to Deny the Writ

This matter involves three employment discrimination cases. All three Petitioners were salespeople for defendant, The Quaker Oats Company. Two of them, Joseph Gentile and Jerry Jeney, lost their jobs in 1994, during a nationwide reorganization that eliminated approximately 300 sales jobs (the "1994 re-engineering"). The third Petitioner, Perry ("Jake") Coleman, survived the 1994 re-engineering; in fact, he was promoted at that time. Coleman wasn't terminated until a year later, in 1995, during an *unrelated* reduction in force (the "1995 RIF"). All three Petitioners ("plaintiffs") asserted age discrimination claims under ADEA — along with other claims that are not relevant to the Petition For Certiorari. There are many reasons why the present cases are not certworthy, including the following:

• **Waiver by *Settlement*:** Two of the Petitioners, Gentile and Jeney, settled their claims against Quaker. As part of that settlement, they expressly waived all claims raised in their Certiorari Petition. The settlement agreement allowed them to pursue their appeal in the Ninth Circuit (the settlement amount would have increased if that appellate court ruled in their favor), but once the Ninth Circuit ruled, the waiver became binding and final.

• **Waiver of a Dispositive *Evidentiary* Issue:** The third Petitioner, Coleman, seeks to assert a disparate impact claim. However, due to an evidentiary ruling, the record in *his* case contains absolutely no statistical evidence. In *Coleman*, the district court granted a motion to strike all statistical evidence proffered by Coleman. Coleman did not appeal that evidentiary ruling, which applied only to his case (not to Jeney's or Gentile's). As the district court noted, without any statistical evidence to support it, Coleman's

disparate impact claim cannot possibly succeed on the merits. This alternative ground for the district court's ruling moots the issue raised in the Certiorari Petition.

• **Misstating the "Issues Presented":** One major issue, according to the Petition, is as follows: in an ADEA case, must a disparate impact claim be identified in the pleadings; *i.e.*, must the Complaint give notice that plaintiff intends to pursue a disparate impact theory, in addition to a disparate treatment claim? There are two reasons why this is an inaccurate statement of the issues presented.

First, before this Court could decide the "notice pleading" issue, it would need to decide an entirely different, and much broader, question: is disparate impact a viable theory of recovery under ADEA? This Court has never squarely resolved that issue, but strongly suggested that disparate impact claims are not viable under ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). *Second*, contrary to plaintiffs' assertion, the Ninth Circuit did *not* hold that disparate impact claims always must be identified in the pleadings (although such a holding would have been correct). Rather, the Ninth Circuit held that a disparate impact claim must *either* be identified in the pleadings *or* disclosed during discovery. Here, plaintiffs did neither. They never mentioned disparate impact in their Complaints, *and* then they concealed this theory during discovery.

• **The Alleged "Intra-Circuit Conflict" is Not Certworthy:** Plaintiffs do not claim that the Ninth Circuit's decision created a split with any other circuit. Rather, they insist that it created an intra-circuit conflict within the Ninth Circuit. That allegation is not worthy of this Court's attention, for at least two reasons. *First*, the proper mechanism for resolving an intra-circuit conflict is en banc

review by that appellate court, not a writ of certiorari. *Second*, no Ninth Circuit judge shared plaintiffs' view that the decision below created a serious intra-circuit split, as evidenced by the Order Denying Rehearing En Banc, which states: "no active judge has requested a vote on whether to rehear the matter en banc." (Appendix to Petition, p. 165a).

• **No Issue of General Concern:** With respect to the disparate treatment claims, the pertinent legal rules are well-settled. Petitioners merely disagree with how the Ninth Circuit *applied* those legal rules to the particular facts of their cases. For example, the Ninth Circuit never claimed that it was entitled to "weigh the evidence" when reviewing a summary judgment. Rather, applying established case law, it held that the specific evidence plaintiffs offered was not probative of pretext, since it failed to cast doubt on the veracity of Quaker's explanations.

• **No "Disregard" of *Reeves*:** The Ninth Circuit's opinion did not cite, by name, this Court's recent decision in *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000). From this mere fact, Petitioners conclude that the Ninth Circuit must have "disregarded" the principles set forth in *Reeves*. That is absurd. *Reeves* addresses what happens when a discrimination plaintiff raises a genuine question of "pretext"; *i.e.*, is such a showing sufficient to preclude summary judgment, or must there be additional evidence which points directly to age, race, or sex as a factor in the challenged decision? That issue never arose here, because none of these plaintiffs offered evidence from which a reasonable jury could find "pretext."

II. Gentile and Jeney Waived All of Their Claims via a Settlement

Gentile and Jeney are barred from pursuing their claims against Quaker, because they waived those claims as part of a settlement agreement. Gentile signed his settlement agreement on October 11, 1999, and Jeney signed his on the same date. (Copies of these Agreements are appended hereto). Both plaintiffs received and cashed their settlement checks.

There is no question that under these settlements, each plaintiff waived his present claims. Paragraph 1 of each settlement agreement clearly states:

> Except as provided in paragraph 4(b), you forever waive and release any and all claims against Quaker . . . that arise out of or relate in any way to your employment with Quaker, the termination of that employment, and/or Quaker's failure to re-hire you. . . . Without limitation, this waiver and release includes all claims asserted in your Lawsuit, plus all claims and charges under the Age Discrimination in Employment Act of 1967 ("ADEA"). . . .

(Appended hereto, pp. 2a, 11a).

These settlements were reached long before the Ninth Circuit ruled on plaintiffs' appeals. However, under these agreements, the exact sum due to each plaintiff depended on the outcome of his appeal to the Ninth Circuit:

> This settlement is a "high-low" deal. That means you are guaranteed a certain minimum payment (the "low"). You also have the potential to receive

> an additional, larger payment (the "high"), if you win your appeal.

(Appended hereto, pp. 3a, 12a). Thus, solely to determine whether plaintiffs would receive the "high" or the "low" payment, paragraph 4(b) created a narrow exception to the waiver — it permitted plaintiffs to pursue their appeals *to the Ninth Circuit*:

> [Y]ou may continue to pursue your appeal *to the Ninth Circuit*. . . . If *the Ninth Circuit* affirms across-the-board, Quaker shall not owe you any payment beyond the ["low"] sum described in paragraph 4(A). However, if *the Ninth Circuit* reverses and/or remands one or more of the issues raised in your appeal, then Quaker must [pay you an additional amount — the "high"].

(Appended hereto, pp. 4a-5a, 13a-14a) (¶ 4(B)) (emphasis added). Once the Ninth Circuit ruled, this purpose was satisfied; *i.e.*, the payment amount was determined.

The agreement does not create an exception for certiorari petitions. To the contrary, ¶ 8 reiterates that "once the Ninth Circuit issues a final judgment," the settlement can be cited "to establish a waiver," if either party initiates any "subsequent proceedings." (Appended hereto, pp. 7a, 16a). Likewise, ¶ 4 confirms that a certiorari petition was not contemplated: the Ninth Circuit's decision is considered "final" once that appellate court rules on any petition for "rehearing or rehearing en banc." (Appended hereto, pp. 6a, 15a). The Agreement is clear and unambiguous. Gentile and Jeney waived all claims raised in their Certiorari Petition.

III. Reasons to Deny the Writ — re: Disparate Impact claims

A. Background

Plaintiffs did not mention anything about a disparate impact claim in their Complaints. Not only are the words "disparate impact" absent, they did not plead the basic elements of a disparate impact claim: *e.g.*, that a "facially neutral" employment practice caused a "statistical disparity," or "disproportionately excluded" members of a protected group.

Then, during discovery, plaintiffs concealed their intent to pursue disparate impact claims. They had many opportunities to mention this theory, over a period of two years, in connection with various discovery disputes. For example, Quaker objected to interrogatories about the "business reasons" for its decisions, arguing that its business judgment is not open to challenge in a disparate treatment lawsuit. Plaintiffs could have ended this dispute simply by saying, "We are pursuing a disparate impact claim, and your 'business reasons' are highly relevant to *that* claim." Instead, plaintiffs chose to keep silent about their intent to pursue the disparate impact theory.

Finally, even when granted leave to amend their complaints (in March 1997), five (5) months *after* the deadline for amending pleadings, plaintiffs chose not to mention disparate impact. Gentile and Jeney added Title VII claims (disparate treatment), but none of the plaintiffs pled a disparate impact claim under ADEA.

The first time they mentioned "disparate impact" was in a summary judgment brief. Subsequently, *after* Quaker had

fully briefed the summary judgment motions, plaintiffs requested leave to amend their complaints and add disparate impact. The district court denied these motions, under Fed. R. Civ. P. 16(b), and the Ninth Circuit affirmed.

B. Plaintiffs have Misdescribed the Ninth Circuit's Holding

According to plaintiffs, the Ninth Circuit ignored the concept of "notice pleading"; supposedly, it required them to plead their disparate impact claim in detail. (Petition, p. 7). That is simply not true. The Ninth Circuit held as follows:

> [W]e hold that the plaintiffs, who clearly stated ADEA claims of disparate treatment [in their Complaints] but sought also to pursue claims of disparate impact, were required *either* (1) to plead the additional disparate impact theory in their complaints, *or* (2) to make known during discovery their intention to pursue recovery on the disparate impact theory [which was] omitted from their complaints. Only if defendants have been put on notice [in *at least one* of these ways] may the plaintiffs proceed on a disparate impact theory at the summary judgment stage.

(Opinion[1], p. 40a) (emphasis added). In other words, a plaintiff is not allowed to sandbag his disparate impact claim by keeping it "secret" until after discovery closes. When, as here, a plaintiff fails to mention *anything* about "disparate impact" in his Complaint, *and completely* conceals that

---

1. "Opinion" refers to the Ninth Circuit's opinion in the present cases: 232 F.3d 1271 (9th Cir. 2000). The page reference identifies where, within the Appendix to plaintiff's Cert. Petition, the quotation can be found.

theory of recovery during discovery, he cannot raise a disparate impact claim — for the first time — during the summary judgment stage. That is the only issue this case presents.

C. A Predicate Issue: Disparate Impact Claims are Not Viable Under ADEA

In Title VII cases, of course, disparate impact claims are cognizable. However, in the present cases, plaintiffs seek to pursue that theory under a different statute, the ADEA. This Court has "never decided whether a disparate impact theory of liability is available under the ADEA," expressly reserving judgment on that question. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Subsequently, several circuits concluded that disparate impact is outside the scope of ADEA. *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir. 1996) ("[we] hold that disparate impact claims are not cognizable under the ADEA"); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076 (7th Cir. 1994); *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 733 n.21 (3d Cir. 1995); and *Mullin v. Raytheon Co.*, 164 F.3d 696, 703 (1st Cir. 1999).

The Ninth Circuit acknowledges that *Hazen Paper* cast doubt on the viability of such claims. *Mangold v. Calif. Public Utilities Comm'n*, 67 F.3d 1470, 1474 (9th Cir. 1995) ("there is some indication that the [disparate impact] theory should not apply" under ADEA). Still, it has continued to recognize them, and it followed that precedent here. (Opinion, p. 35a) ("We have continued to *assume*," without analyzing the issue, "that this theory is still viable after *Hazen [Paper]*") (emphasis added).

If this Court grants certiorari, it would need to resolve this open question, before it could reach the "notice pleading" issue posed by plaintiffs. That would require the Court to consider the legislative history and purposes of ADEA,[2] as well as textual differences between ADEA and Title VII,[3] which suggest that disparate impact theory cannot be

---

2. Congress' reasons for outlawing age bias were different than the concerns underlying race and sex discrimination laws. "Disparate treatment" (*i.e.*, intentional discrimination), not disparate impact, "captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper*, 507 U.S. at 610 (people do not hate older workers for being old, but sometimes make decisions "on the basis of inaccurate and stigmatizing stereotypes") (emphasis added). "When the employer's decision is wholly *motivated* by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is *correlated* with age." *Hazen Paper*, 507 U.S. at 610 (emphasis added) (holding that employers are permitted to make termination decisions based on which workers have the highest salaries, even though there is a strong correlation between age and salary). Disparate impact theory embodies exactly the opposite view. The whole concept of disparate impact is that *regardless* of an employer's motives, liability arises from the use of criteria that happen to *correlate* with a protected characteristic, since members of one class suffer disproportionately when that criteria is used. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1423-24 (9th Cir. 1990).

3. There are major textual differences between the two statutes. In 1991, Congress amended Title VII, specifically providing for disparate impact claims, but added no comparable provision to the ADEA. *See* 42 U.S.C. § 2000e-2(k). Conversely, the ADEA has an affirmative defense, under which proof that an employer's decision was based on a "reasonable factor other than age" ("RFOA") precludes liability. 29 U.S.C. § 623(f)(1). The RFOA defense, which has no counterpart in Title VII, seems incompatible with a disparate impact claim. *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir. 1996).

transplanted from one statute to the other. Plaintiffs completely failed to address any of these complex issues in their Petition. They did not even inform the Court that this issue would arise if it granted certiorari, despite the fact that Quaker raised this argument in the district court and in the Ninth Circuit.

D. Coleman Waived a Dispositive Evidentiary Issue

In the *Coleman* case, the record contains absolutely no evidence of any statistical disparity. This fact moots the "notice pleading" issue, at least in his case.

All three plaintiffs hired the same statistical expert, Dr. Bardwell, who prepared the same report for all of their cases. Bardwell's report analyzed data from the **1994** re-engineering. (Bardwell Revised Rpt.) (cover page states that his report analyzed terminations from "July 1 to September 1, **1994**") (emphasis added). Unlike his fellow plaintiffs, though, Coleman wasn't terminated until **1995**, during a separate RIF. The 1995 RIF involved different decision-makers, different rating criteria, and different selection rules. By his own admission, Dr. Bardwell failed to analyze whether the 1995 RIF caused a statistical disparity based on age:

> Q. You don't have any test as to whether there's a statistically significant difference for anything *after* the 1994 re-engineering, correct?
>
> A. I haven't performed that calculation.

(Q.Exc. in *Coleman*, p. 74) (Bardwell depo.).[4]

---

4. "Q.Exc." refers to Quaker's Excerpts of the record, which were filed in the Ninth Circuit. In this instance, we are referrring to the Excerpts filed in the *Coleman* case.

Accordingly, in the *Coleman* case, the district court struck Dr. Bardwell's report from the record. (District Court's 3/10/99 Opinion in *Coleman*, p. 25) ("it is FURTHER ORDERED granting Defendant's Motion To Strike Dr. Bardwell's Testimony"). Coleman did not appeal this evidentiary ruling, so any potential objection to it has been waived, as the Ninth Circuit held:

> Although Coleman uses the [statistical] evidence in his brief to our court, he never challenges the district court's order striking [his expert's report]. Accordingly, he has waived this issue, and the statistical evidence cannot be considered part of the record [in his case].

(Opinion, p. 29a).

This uncontested evidentiary ruling moots Coleman's "notice pleading" argument. Even if Coleman could pursue a disparate impact claim, despite failing to plead it or disclose it during discovery, his claim still must fail as a matter of law, since there is no evidence of any statistical disparity. The district court noted this as an alternative ground for granting summary judgment in the *Coleman* case. (District Court's 3/10/99 Opinion in *Coleman*, pp. 14-15 n.1) ("[Coleman]'s disparate impact claim is without a doubt meritless").

E. The Merits: a Disparate Impact Claim Must be Pled

As noted, the decision below stopped short of requiring that a disparate impact claim must be expressly identified in the Complaint. However, imposing such a pleading requirement would be entirely consistent with existing authority, both in the Ninth Circuit and elsewhere. In no way would such a requirement conflict with the concept of "notice pleading."

Disparate treatment is a very different type of claim than disparate treatment. It has different legal elements and, at least in Title VII cases, different potential remedies. Accordingly, several circuits have held when a plaintiff pleads disparate treatment, but fails to mention disparate impact in his Complaint, he cannot pursue a disparate impact claim. *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 641-42 (3d Cir. 1993) (plaintiff "should have moved to amend his pleadings during discovery . . . [to add] a disparate impact claim"; since he did not, the claim cannot be considered); *AFSCME v. County of Nassau*, 96 F.3d 644, 647 (2d Cir. 1996) ("because [plaintiff] never amended its complaint to adequately plead a disparate impact claim," the only claim it could pursue was intentional discrimination); *Netterville v. Missouri*, 800 F.2d 798, 801 (8th Cir. 1986) (plaintiff "failed to plead disparate impact," so that claim was "waived").

Likewise, treating disparate impact and disparate treatment as two distinct claims, each of which must be pled, is consistent with Ninth Circuit precedent. In one case, for example, a plaintiff's EEOC charge only identified a disparate impact claim, without mentioning disparate treatment. Because of this omission, the plaintiff was precluded from pursuing a disparate treatment claim in her subsequent lawsuit:

> Any investigation of whether [plaintiff's] application was rejected as the result of disparate *impact* would not have encompassed her subsequent claim that when she reapplied to the program she was subjected to *intentional* sex discrimination. . . . [Plaintiff's] failure to exhaust her administrative remedies before the EEOC

> [with respect to disparate treatment] precluded the presentation of her discriminatory treatment claim in federal court.

Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 730 (9th Cir. 1984) (emphasis in *original*) (internal citations omitted).

F. Plaintiffs Rely on an Inapplicable Rule of Civil Procedure

According to plaintiffs, even if they were required to plead their disparate impact claims, the district court should have granted leave to amend their Complaints — despite the fact that they did not request leave to amend until *after* discovery closed, and *after* summary judgment was fully briefed. According to plaintiffs, the district court misapplied the liberal standard contained in Fed. R. Civ. P. 15(a), under which leave to amend "shall be freely given when justice so requires." (Petition, p. 2).

Unfortunately for plaintiffs, Rule 15(a) is inapplicable. When, as here, a scheduling order sets a deadline for amending the pleadings, and plaintiff misses that deadline, his "ability to amend his complaint [is] governed by Rule 16(b), not Rule 15(a)." *Johnson v. Mammoth Recreations*, 975 F.2d 604, 607-08 (9th Cir. 1992). Under Rule 16, an untimely amendment is permissible "only to prevent manifest injustice," and the inquiry focuses on "the diligence of the party seeking the amendment." *Johnson*, 975 F.2d at 608-09. This is very different than the standard that applies under Rule 15(a):

> Unlike Rule 15(a)'s liberal amendment policy which focuses on bad faith of the [moving party]

> . . . and the prejudice to the opposing party, Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment.

Johnson, 975 F.2d at 609. Here, plaintiffs missed the deadline for amending pleadings by more than one year. Accordingly, both the district court and the Ninth Circuit held that Rule 16(b), not Rule 15(a), governed their requests to amend. Nonetheless, their Certiorari Petition continues to cite Rule 15(a), without mentioning the "good cause" standard that applies under Rule 16(b).

IV. Reasons To Deny the Writ — re: Disparate Treatment claims

A. General Standards for Summary Judgment: *Reeves* is Not Implicated

After oral argument below, but before the Ninth Circuit issued its opinion, this Court handed down its ruling in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Both parties submitted letter-briefs to the Ninth Circuit panel regarding what impact, if any, *Reeves* should have on the present case. Thus, the Ninth Circuit was fully aware of *Reeves* when it issued its decision.

According to plaintiffs, the Ninth Circuit "disregarded" *Reeves*' teachings about the general standards governing summary judgment motions. Why do plaintiffs make that claim? Merely because the Ninth Circuit did not cite *Reeves*, by name, in its opinion below. (Petition, p. 5) ("*Reeves* is neither acknowledged, referenced nor cited in the Opinion"). That is a *non sequitur*.

Long before *Reeves*, it was firmly established that at the summary judgment stage, a court must draw all "justifiable inferences" in favor of the non-moving party, and it cannot make "credibility determinations." *E.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In its opinion below, the Ninth Circuit acknowledged and followed these hornbook principles. *E.g.*, (Opinion, p. 25a) ("looking at the evidence in the *light most favorable to Jeney*, no reasonable juror could conclude . . . that Quaker intentionally discriminated against him because of his age") (emphasis added).

Beyond reiterating those basic tenets, *Reeves* resolved the "pretext-plus" debate. Under *Reeves*, proof that defendant gave a pretextual explanation, by itself, is usually (but not always) sufficient to raise a genuine question that age was the real reason for its employment decision. *Reeves*, 530 U.S. at 148-49. That aspect of *Reeves* was new. It only applies, though, in cases where the evidence can support a finding of "pretext." Here, that was not the case. As the courts below held, no reasonable jury could find that Quaker's explanations were pretextual, i.e., no evidence cast doubt on the veracity of those explanations. Thus, there was no reason for the Ninth Circuit to cite *Reeves* in its opinion.

B. Plaintiffs have Misrepresented the Procedural History of These Cases

According to plaintiffs, the Ninth Circuit's decision below conflicts with other Ninth Circuit cases regarding the probative value certain types of evidence: (a) statistics; (b) an EEOC finding of "reasonable cause"; and (c) "subjective" criteria. In an effort to manufacture support for this "intra-circuit conflict" theory, plaintiffs have misrepresented the procedural history of these cases. According

to them, several Ninth Circuit judges believed that under existing Circuit precedent, the disparate treatment claims should have gone to trial. In plaintiffs' words, Quaker won a "split decision" from the panel that heard these cases, and then there was "another split decision" on the petition for rehearing en banc. (Petition, pp. 4-5). That is simply not true.

The *panel* consisted of Judge Canby (a Carter appointee), Judge O'Scannlain (a Reagan appointee), and Judge Betty Fletcher (another Carter appointee). Judge Fletcher dissented, but only with respect to the *disparate impact* theory (emphasis in *original*):

> [R]egardless of intent, the *real* issue in this case is whether the process had a disparate impact on the older protected members of the work force. The majority blinds itself to our own circuit precedent . . . in refusing to look at disparate impact. For this reason, I must dissent. * * * [W]e should remand each of these cases to the district court to analyze whether the evidence is adequate to go to trial on the [disparate] impact theory.

(Appendix, pp. 49a, 54a). Accordingly, the panel did not render a "split decision" on the *disparate treatment* claim. Likewise, when plaintiffs sought *rehearing en banc*, there was no "split decision." There wasn't even a vote:

> The full court has been advised of the suggestions for rehearing en banc and *no active judge has requested a vote* on whether to rehear the matter en banc.

(Appendix to Petition, p. 165a) (Order Denying Rehearing En Banc) (emphasis added).

C. "Subjective" Criteria

1. Factual Background

In deciding who to retain during the RIF, Quaker rated each salesperson on specific skill sets. These ratings were partly objective and partly subjective. They were "objective" in the sense that managers based their ratings on *specific facts*, not on stereotypes or assumptions. For example, one criterion addressed the employee's ability to quantitatively analyze sales data and draw conclusions from it: *i.e.*, to figure out "what is driving the numbers." In rating Gentile on this criterion, managers noted that when Gentile was assigned to do this type of analysis, he routinely failed to submit anything — a deficiency noted on *every one* of his annual performance reviews since 1988. His failure to submit these reports was a concrete, "objective" fact.

The ratings also had a "subjective" component. After identifying specific facts, which indicated that someone was above or below average in a particular category, managers still had to decide what rating to assign. For example, on a scale of 1-to-5, did Gentile's failure to submit quantitative analyses merit a "1" or a "2" rating? Managers had to use their *judgment* in making such determinations; in that sense, the ratings were "subjective."

2. Legal Analysis

Plaintiffs insist that anytime an employer uses partially subjective criteria, that mere fact automatically raises an inference of discrimination. That is absurd. It certainly is not the law, in the Ninth Circuit or anywhere else.

Under Ninth Circuit precedent, "the use of subjective employment criteria is not unlawful per se . . . [and] their

relevance to proof of a discriminatory intent is weak." *Sengupta v. Morrison-Knudson Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986). Indeed, subjective criteria are often "indispensable," and are commonly used by "honorable employers." *Sengupta*, 804 F.2d at 1075.

That is faithful to the teachings of this Court. *E.g.*, *Watson v. Fort Worth Bank*, 487 U.S. 977, 991, 997 (1988) ("it is self evident that many jobs . . . require personal qualities" that can only be measured subjectively, such as "common sense, good judgment, originality, ambition, loyalty, and tact"). Further, it is consistent with the law in every other circuit. *E.g.*, *Doan v. Seagate Technology*, 82 F.3d 974, 977 (10th Cir. 1996) ("the use of subjective criteria" does not raise a genuine issue of "intentional discrimination"); *Risher v. Aldridge*, 889 F.2d 592, 597 (5th Cir. 1989) ("subjective criteria necessarily and legitimately enter into personnel decisions"); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 780 (8th Cir. 1995) ("the presence of subjectivity in employee evaluations is not itself a grounds for challenging those evaluations as discriminatory"). In a recent *en banc* decision, the Eleventh Circuit articulated this point well:

> We begin with an important threshold point: A subjective reason can constitute a legally sufficient, legitimate, nondiscriminatory reason. . . . Indeed, subjective evaluations of a job candidate are often critical to the decisionmaking process, and if anything, are becoming more so in our increasingly service-oriented economy. Take, for example, a job requiring continuing interaction with the public, such as a sales clerk or wait staff position. Attitude, articulateness,

> and enthusiasm, as well as appearance, can be vitally important in such a job, yet there are few if any ways to gauge such qualities objectively.
>
> * * *
>
> It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation. . . . To phrase it differently, subjective reasons are not the red-headed stepchildren of [potential] reasons for employment decisions. Subjective reasons can be just as valid as objective reasons.

Chapman v. A.I. Transport, 229 F.3d 1012, 1033-34 (11th Cir. 2000) (*en banc*).

As *Chapman* explains, subjective criteria are not problematic when, as here, the employer articulates the *underlying factual basis* for its conclusion: *i.e.*, what did the employee *say or do* (or fail to say/do) that caused the decisionmaker to rate him favorably or unfavorably?

> A subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion. Continuing our example of a sales clerk or wait staff position, it might not be sufficient for a defendant employer to say it did not hire the plaintiff applicant simply because "I did not like his appearance," with no further

> explanation. However, if the defendant employer said, "I did not like his appearance because his hair was uncombed and he had dandruff all over his shoulders," or "because he had his nose pierced," or "because his fingernails were dirty," or "because he came to the interview wearing short pants and a T-shirt," the defendant would have articulated a "clear and reasonably specific" basis for its subjective opinion — the applicant's bad (in the employer's view) appearance.

Chapman, 229 F.3d at 1034. By articulating the underlying factual basis, an employer permits a court to determine if its subjective judgment call was reasonable and/or consistent. It also gives plaintiff a fair opportunity to show that the proffered reason is just a pretext.

Here, Quaker more than satisfied this requirement. Quaker identified, in great detail, the specific facts that led each plaintiff to receive a relatively low rating: *e.g.*, Gentile's history of not completing projects that required analytical work, and Jeney's utter lack of experience with such analytical work (due to the entry level positions he held throughout his career). Plaintiffs never denied this point, nor did they dispute the specific facts Quaker articulated. That is why the Ninth Circuit affirmed these summary judgments.

D. The EEOC's "Reasonable Cause" Finding

1. Factual Background

In each of these three cases, the EEOC found "reasonable cause" to believe that age discrimination may have occurred. In every instance, it issued a two page *form letter* (*E.g.*, **P**.Exc. in *Gentile*, pp. 456-57) that merely states this

conclusion, without discussing a single concrete fact (*e.g.*, could plaintiff develop a solid business plan; who else was retained in Arizona, and how did their skills compare to plaintiff's, etc.?). As the district court remarked: "the EEOC determination does not discuss the specifics of Plaintiff's case, the reasoning that led to the determination, or what factors were considered." (District Court's 3/10/99 Order in *Coleman*, p. 16). The Court of Appeals concurred: "It is impossible from this letter to know what facts the EEOC considered and how it analyzed them." (Opinion, p. 18a.)

Based on the same type of conclusory findings, the EEOC issued the same "reasonable cause" form letter in the case of Ken Solterisch on the same day as it issued findings regarding Gentile, Jeney, and Coleman. (Q.Exc. in *Gentile*, pp. 635-36) (EEOC's letter re: its findings). *Two years earlier*, however, a federal court in Detroit had granted summary judgment against the same Mr. Solterisch. *Solterisch v. Quaker*, No. 95-CV-72971 (E.D. Mich. 1996).

The same thing happened with other Quaker employees who were terminated during the 1994 re-engineering, including Jane Nussell. The EEOC issued the same "reasonable cause" form letter to Ms. Nussell, on the same day (Q.Exc. in *Gentile*, pp. 639-40), even though a district court had granted summary judgment against Ms. Nussell *a year earlier*. *Nussell v. Quaker*, No. 95-1257 (W.D. Mo. 1997). Likewise, the EEOC found "reasonable cause" regarding Kurt Kennedy (Q.Exc. in *Gentile*, pp. 637-38), but a district court, which had a more complete factual record, granted summary judgment against the same Mr. Kennedy. *Kennedy v. Quaker*, No. 97-CV-72094 (E.D. Mich. 1998). In its form letters, the EEOC made no effort to explain why it ignored the holdings of so many district courts.

Finally, the EEOC used the very same form letter for Coleman. Apparently, the EEOC forgot that unlike all the other charging parties, Coleman was not terminated until 1995. Thus, the EEOC announced "class" findings regarding the 1995 RIF (**P**.Exc. in *Coleman*, p. 241), even though: (a) Coleman was the *only person* terminated during the *1995 RIF* who filed a charge; and (b) the EEOC had no data regarding the 1995 RIF, not even a list of who else was terminated in 1995, or their respective ages:

> The EEOC reasonable cause determination . . . in Coleman's case . . . appears to have been a form letter. Indicative of its lack of probative value, the EEOC letter in Coleman's case includes a recitation that Quaker discriminated against older employees as a class despite the fact that there was no class in 1995 when Coleman was terminated. Coleman was the only employee laid off in that [1995] RIF who filed a charge, and the EEOC had no information regarding other employees terminated that year.

(Opinion, p. 29a).

2. Legal Analysis

According to plaintiffs, the EEOC's "reasonable cause" finding is so probative that, by itself, it automatically precludes summary judgment in every case — no matter how conclusory it is. That is nonsense. No circuit, not the Ninth or any other, has adopted such an absurd rule.

When the EEOC makes "detailed evidentiary statements and findings of fact," some circuits consider them "highly probative." *Cortes v. Maxus Exploration Co.*, 977 F.2d 195,

202 (5th Cir. 1992). But when, as here, the EEOC only reports "bare conclusions," courts universally agree that they have "little, if any, probative value." *Cortes*, 977 F.2d at 202. *See also Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988) (when EEOC states findings "in conclusory fashion" and "merely repeats" plaintiff's allegations, its view is "not sufficiently probative to create a genuine issue"). Indeed, several circuits hold that the EEOC's findings are inadmissible in such circumstances. *E.g.*, *Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309-10 (8th Cir. 1984) (affirms exclusion of EEOC's findings because, in this case, they were "highly conclusory"); *Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123, 126 (5th Cir. 1988); *Smith v. Massachusetts Inst. of Tech.*, 877 F.2d 1106, 1113 (1st Cir. 1989).

The Ninth Circuit followed this view long before the present case. E.g., *Walker v. Gates*, 1990 WL 15101, *3 (9th Cir. 1990) (affirms summary judgment, despite the EEOC's findings, because the EEOC "did not have the benefit of" certain evidence that was presented to the district court). Indeed, even when the EEOC feels so strongly about its "reasonable cause" findings that it files suit in its own name, its opinion does not automatically preclude summary judgment. Many cases, including several in the Ninth Circuit, have granted summary judgment against the EEOC itself. *E.g.*, *EEOC v. Ins. Co. of North America*, 49 F.3d 1418 (9th Cir. 1995); and *EEOC v. Alioto Fish Co.*, 623 F.2d 86 (9th Cir. 1980). As the panel below pointed out:

> If the EEOC's suing is insufficient to create a genuine issue of material fact, then, a priori, a conclusory EEOC reasonable cause letter, at least by itself, does not create an issue of material fact.

(Opinion, p. 18a). The Ninth Circuit's holding on this issue was consistent with precedent, and clearly was correct.

E. Statistical Evidence

As noted earlier, the record in the *Coleman* case does not contain any statistical evidence. The district court granted a motion to strike the statistical report Coleman offered, and Coleman did not appeal that ruling. (*Supra*, pp. 10-11). Thus, "statistics" are only pertinent to the appeals of Gentile and Jeney — both of whom settled their cases.

1. Factual Background

Based on raw numbers, a higher percentage of older workers were terminated during the 1994 re-engineering. Plaintiffs claim that according to their expert, Dr. Bardwell, the odds of such a disparity occurring by chance were "3-out-of-100-billion." But they omit to mention that Bardwell conducted eight statistical tests, not just one. Plaintiffs pick the most extreme result, ignoring others that were very different — indeed, not even statistically significant.

At plaintiffs' insistence, the database included everyone in Quaker's sales organization, from receptionists to vice presidents. Bardwell's most extreme result (the "3-in-100-billion" figure) resulted from a "Chi-squared" test. That simplistic test *ignored every* distinction between employees (except ages) — even obvious factors, such as what type of job each person held, and whether such work continued to exist after re-engineering. The Chi-Squared test lumped everyone together; *i.e.*, it assumed that a vice president at corporate headquarters had the same chance of being terminated as an entry level salesperson in rural Montana (where all sales jobs were eliminated) or a receptionist in Jacksonville (where Quaker closed its sales office):

> Q. The Chi-square test . . . does not attempt to control for *any* variables, correct?
>
> A. That's correct.

(Q.Exc. in *Gentile*, pp. 72, 131) (Bardwell deposition) (emphasis added). Bardwell conceded that such a test can be "very misleading." (Q.Exc. in *Gentile*, pp. 72, 125-26) (Bardwell depo.).

When Bardwell did other tests that tried to account for several obvious factors, he obtained very different results that were *not* statistically significant. One analysis showed that the odds of the observed disparity occurring by chance were **4.9%** (about 1 in 20). (Q.Exc. in *Gentile*, pp. 676-77) (Bardwell Rebuttal Rpt.). Bardwell concedes that these latter results do *not* qualify as "significant" under the standard established by the Supreme Court, but he ignored that standard and called them significant anyway: "I'm sorry to the Supreme Court," but its standard "is nonsense." (Q.Exc. in *Gentile*, p. 132) (Bardwell depo.).

2. Legal Analysis

Quaker explained, in detail, why each plaintiff was terminated; *i.e.*, why other specific salespeople, such as Lisa Rodriguez, were better qualified for the particular jobs that remained in Arizona after the RIF. Plaintiffs did not even try to contest those specific facts, which explained their individual terminations. Instead, they relied on Bardwell's aggregate statistical data. Following established precedent, the Ninth Circuit held that such evidence failed to raise a genuine question, for two independent reasons.

First, before statistical evidence can be probative of discrimination, it must account for "obvious variables" that might provide a nondiscriminatory explanation, such as the type of job each person held, and the geographic location in

which s/he was employed. (Opinion, p. 17a). That is consistent with Ninth Circuit precedent. *E.g.*, *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1423 (9th Cir. 1990). Indeed, the panel below expressly relied on *Rose* in reaching its decision:

> We have previously held that statistics remarkably similar to these failed to raise a triable issue of fact of intent to discriminate. In *Rose*, [although there was a comparable disparity in the raw numbers,] . . . we pointed to the fact that older individuals tended to occupy the [type] of positions [management jobs] eliminated during th[at] reorganization. [902 F.2d at 1423.] Likewise, older individuals tended to occupy the [type of] sales positions [Sales Rep. and Customer Manager] eliminated and outsourced by Quaker.

(Opinion, p. 16a). This rule is not unique to the Ninth Circuit. To the contrary, it is widely followed. *E.g.*, *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10th Cir. 1994) (before statistics can raise a genuine question of pretext, they must rule out obvious nondiscriminatory variables); *Sheehan v. Daily Racing Form*, 104 F.3d 940, 942 (7th Cir. 1997) (when a statistical analysis fails to account for obvious, nondiscriminatory factors, it is "inadmissible"; thus, it has "zero" probative value at the summary judgment stage); *Raskin v. Wyatt Co.*, 125 F.3d 55, 67 (2d Cir. 1997) (tests that made "no attempt to account for" obvious factors are "inadmissible").

Second, like any other kind of evidence, for statistics to have probative value at the pretext stage, it "must raise questions as to the veracity of the reasons Quaker gave for not retaining [this plaintiff] specifically." (Opinion, p. 17a).

Here, Bardwell expressly admitted that his statistical tests fail this requirement; they do not shed light on the probability that these *particular* plaintiffs, Gentile and Jeney, were victims of age discrimination:

> Q. Does your model tell you which older workers were victims of discrimination and which ones . . . would have been terminated anyway [based on merit]?
>
> A. It can't make that prediction for an individual employee * * * [including Mr. Gentile or Mr. Jeney].

(Q.Exc. in *Jeney*, p. 108) (Bardwell depo.). Under Ninth Circuit precedent, such statistical evidence, by itself, has little or no probative value at the pretext stage of the inquiry:

> While statistics are often probative in determining the existence of a pattern and practice of discrimination, their usefulness in proving *pretext* depends primarily upon their relevance to the *specific decision affecting the individual plaintiff*, and not those that affect plaintiff's protected class in general.

Penk v. Oregon Bd. of Higher Educ., 816 F.2d 458, 462 (9th Cir. 1987) (emphasis added). Again, this Ninth Circuit rule is consistent with the law in other circuits. *E.g.*:

> [T]he statistics here do not tend to establish that age played a factor in any *particular* decision. Unless the plaintiffs can show that the defendants' explanations [of their individual discharges] are inherently suspect or can present other direct or circumstantial evidence suggesting that the

> proffered reasons are not true, the defendants are entitled to summary judgment.

Barnes v. Gencorp, 896 F.2d 1457, 1469 (6th Cir. 1990). *See also Hutson*, 63 F.3d at 778 (8th Cir. 1995) (statistics "may *support* a finding of pretext," but only when non-statistical evidence provides "*independent* . . . grounds for disbelieving" the employer's explanation of its decision to terminate this "specific" plaintiff) (emphasis added).

In sum, statistics often help to establish a *prima facie* case. Further, when there is *other*, non-statistical evidence of pretext, statistics can help point the finger at age (or race or sex) as the real culprit. But when, as here, the employer identifies the specific shortcomings that led to plaintiff's termination, and it is undisputed that those shortcomings are real, statistics cannot make them go away.

CONCLUSION

The Writ of Certiorari should be denied. Plaintiffs have not raised any certworthy issues. Further, Gentile and Jeney waived all of their claims when they settled.

Respectfully submitted,

MARTIN HARRIS
CONNELLY SHEEHAN MORAN
Attorneys for Respondent
150 South Wacker Drive
Suite 1600
Chicago, Illinois 60606
(312) 372-1969